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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

11 ROBERT MATUS, individually) Case No. EDCV 15-01851 DDP (DTBx)
12 and on behalf of all others)
13 similarly situated,)
14 Plaintiff,) **ORDER GRANTING DEFENDANT'S MOTION**
15 v.) **TO DISMISS FOR LACK OF PERSONAL**
16 PREMIUM NUTRACEUTICALS, LLC,) **JURISDICTION**
17 a Georgia Corporation,) [Dkt. 24]
18 Defendants.)
19 _____)

20 Presently before the court is Defendant Premium
21 Nutraceuticals, LLC ("Premium")'s Motion to Dismiss. Having
22 considered the submissions of the parties and heard oral argument,
23 the court grants the motion and adopts the following Order.

24 **I. Background**

25 Premium is a limited liability corporation incorporated in
26 Georgia. (Declaration of Jeffrey F. Peil ¶ 9). Premium's principal
27 place of business is also Georgia. (First Amended Complaint ("FAC")
28 ¶ 6.) Premium manufactures, markets and sells Vydox, a dietary

1 supplement with a daily male performance formula. (FAC ¶¶ 1, 6.)
2 Premium markets its product through its website. (Declaration of
3 Joseph Testino ¶ 13.) 1.4% of Premium's total sales revenue is
4 "derived from the sale of products" to California residents. (Id.)
5 Premium markets Vydox to nine resellers who in turn market the
6 products to consumers. (Testino Decl. ¶ 30.) The resellers do not
7 have brick and mortar stores, but rather maintain their own
8 websites, each with their own unique claims about the efficacy of
9 Vydox. (Id.) The resellers account for around 1.9% of all sales of
10 Vydox. (Id.)

11 Plaintiff Robert Matus ("Matus") is a California resident.
12 (FAC ¶ 5.) He purchased Vydox for his personal use through a third-
13 party reseller. (Id.) Matus alleges that Premium's claim of
14 Vydox's efficacy are inaccurate and not properly substantiated.
15 Matus sued in state court, on behalf of a putative class, for
16 violations of California's Consumers Legal Remedies Act,
17 Advertising Law, California Business and Professions Code §§ 17200
18 et seq., and negligent misrepresentation. Premium removed to this
19 court, and now moves to dismiss.

20 **II. Legal Standard**

21 Federal Rule of Civil Procedure 12(b)(2) provides that a court
22 may dismiss a suit for lack of personal jurisdiction. The
23 plaintiff has the burden of establishing that jurisdiction exists.
24 See Sher v. Johnson, 911 F.2d 1357, 1361 (9th Cir. 1990). Where,
25 as here, the motion is based on written materials rather than an
26 evidentiary hearing, "the plaintiff need only make a *prima facie*
27 showing of jurisdictional facts." Caruth v. International
28 Psychoanalytical Ass'n, 59 F.3d 126, 128 (9th Cir. 1977); Pebble

1 Beach Co. v. Caddy, 453 F.3d 1151, 1154 (9th Cir. 2006). "Although
 2 the plaintiff cannot simply rest on the bare allegations of its
 3 complaint, uncontroverted allegations in the complaint must be
 4 taken as true." Schwarzenegger v. Fred Martin Motor Co., 374 F.3d
 5 797, 797 (9th Cir. 2004) (internal quotations and citation
 6 omitted). Conflicts between parties over statements contained in
 7 affidavits must be resolved in the plaintiff's favor. Id.

8 **III. Discussion**

9 District courts have the power to exercise personal
 10 jurisdiction to the extent authorized by the law of the state in
 11 which they sit. Fed. R. Civ. P. 4(k)(1)(A); Panavision Int'l, L.P.
 12 v. Toeppen, 141 F.3d 1316, 1320 (9th Cir. 1998). Because
 13 California's long-arm statute authorizes personal jurisdiction
 14 coextensive with the Due Process Clause of the United States
 15 Constitution, see Cal. Civ. Code § 410.10, this court may exercise
 16 personal jurisdiction over a nonresident defendant when that
 17 defendant has "at least 'minimum contacts' with the relevant forum
 18 such that the exercise of jurisdiction 'does not offend traditional
 19 notions of fair play and substantial justice.'" Schwarzenegger,
 20 374 F.3d at 800-01 (citing Int'l Shoe Co. v. Washington, 326 U.S.
 21 310, 316 (1945)). The contacts must be of such a quality and
 22 nature that the defendants could reasonably expect to be "haled
 23 into court there." World-Wide Volkswagen v. Woodson, 444 U.S. 286,
 24 297 (1980).

25 **A. General Jurisdiction**

26 Personal jurisdiction may be either general or specific.
 27 Gator.Com, 341 F.3d at 1076. "General jurisdiction exists when
 28 there are substantial or continuous and systematic contacts with

1 the forum state, even if the cause of action is unrelated to those
2 contacts." Id. "The standard for establishing general
3 jurisdiction is fairly high" Id. (citations omitted). "The
4 contacts with the forum state must be of a sort that approximate
5 physical presence." Id. "Factors to be taken into consideration are
6 whether the defendant makes sales, solicits or engages in business
7 in the state, serves the state's markets, designates an agent for
8 service of process, holds a license, or is incorporated there." Id.
9 at 1076-77 (citations omitted). The court focuses on "the economic
10 reality of the defendants' activities rather than a mechanical
11 checklist." Id. "Even if substantial, or continuous and systematic,
12 contacts exist, the assertion of general jurisdiction must be
13 reasonable." Id.

14 Here, Premium argues that its contacts with California are
15 insufficient to establish general jurisdiction. Premium argues that
16 Premium has less contact with California than the defendants in
17 Daimler AG v. Bauman, 134 S. Ct. 746 (2014) and Helicopteros
18 Nacionales de Columbia v. Hall, 466 U.S. 408 (1984), cases where
19 the Supreme Court found defendants' sales were insufficient to
20 establish general jurisdiction. (Mot. Dismiss at 9.) Plaintiff
21 appears to concede as much, arguing that the issue is whether the
22 Court has specific jurisdiction over defendant. (Opp. at 2-3).

23 The court agrees with Premium that general jurisdiction is
24 lacking here. Lack of physical presence alone, of course, is not
25 dispositive. In Gator.com, for example, general jurisdiction
26 existed even though the defendant had "few of the factors
27 traditionally associated with physical presence, such as an
28 official agent or incorporation." 341 F.3d at 1078. Defendant had

1 "extensive marketing and sales in California, [] extensive contacts
2 with California vendors, and . . . its website [was] clearly and
3 deliberately structured to operate as a sophisticated virtual store
4 in California." Id. Defendant "also mailed a substantial number of
5 catalogs and packages to California residents, targeted substantial
6 numbers of California residents for direct email solicitation, and
7 maintained substantial numbers of 'on-line' accounts for California
8 consumers California residents [could] view and purchase
9 products on-line as well as interact with [defendant's] customer
10 service representatives 'live' over the internet if they have
11 questions or concerns." Id.

12 Here, Premium's contacts with California are nowhere near as
13 systematic and continuous as the defendant's contacts in Gator.com.
14 Indeed, its only apparent contact with California is via its
15 website, which appears to generate only 1.4% of Vydox sales revenue
16 from sales to California residents.¹ Accordingly, this court does
17 not have general jurisdiction over Premium.

18 B. Specific Jurisdiction

19 The Ninth Circuit applies a three prong test to establish
20 specific jurisdiction.

21 (1) The non-resident defendant must purposefully direct his
22 activities or consummate some transaction with the forum or
23 resident thereof; or perform some act by which he purposefully
24 avails himself of the privilege of conducting activities in
the forum, thereby invoking the benefits and protections of
its laws;

25 (2) the claim must be one which arises out of or relates to
the defendant's forum-related activities; and

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¹ It is somewhat unclear whether this figure refers to direct sales or includes sales to or through third-party resellers.

1 (3) the exercise of jurisdiction must comport with fair play
2 and substantial justice, i.e. it must be reasonable.
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4 Schwarzenegger v. Fred Martin Motor Co., 374 F.3d 797, 802 (9th
5 Cir. 2004.

6 The "plaintiff bears the burden of satisfying the first two
7 prongs of the test." Id. "If the plaintiff succeeds in satisfying
8 both of the first two prongs, the burden then shifts to the
9 defendant to 'present a compelling case' that the exercise of
jurisdiction would not be reasonable." Id.

10 1. Purposeful availment

11 The Plaintiff must show that Premium "purposefully availed
12 itself of the privilege of conducting activities in California, or
13 purposefully directed its activities toward California."² Id. The
14 phrase 'purposeful availment' is often used in "shorthand fashion,
15 to include both purposeful availment and purposeful direction." Id.
16 However, "availment and direction are [] two distinct concepts. A
17 purposeful availment analysis is most often used in suits sounding
18 in contract. A purposeful direction analysis, on the other hand, is
most often used in suits sounding in tort." Id.

19 Here, Plaintiff alleges violations of the Consumers Legal
20 Remedies Act, violations of the California's False Advertising Law,
21 violations of the California Business and Professions Code §§
22 17200 et seq., and negligent misrepresentation. (Complaint.)
23 Therefore, the court will apply a purposeful direction analysis.

24 See Brayton Purcell LLP v. Recordon & Recordon, 606 F.3d 1124, 1128
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26 ² "A showing that a defendant purposefully directed his
27 conduct toward a forum state . . . usually consists of evidence of
the defendant's actions outside the forum state that are directed
28 at the forum, such as the distribution in the forum state of goods
originating elsewhere." Fred Martin Motor Co., 374 F.3d at 803.

1 (9th Cir. 2010) (applying purposeful direction to a false
2 advertising claim).

3 The Court evaluates "purposeful direction under the three-part
4 'effects' test traceable to the Supreme Court's decision in Calder
5 v. Jones, 465 U.S. 783 (1984)." Fred Martin Motor Co., 374 F.3d at
6 803. The effects test requires that defendant allegedly have "(1)
7 committed an intentional act, (2) expressly aimed at the forum
8 state, (3) causing harm that the defendant knows is likely to be
9 suffered in the forum state." Id.

10 **i. Intentional Act**

11 The Court construes "'intent' in the context of the
12 'intentional act' test as referring to an intent to perform an
13 actual, physical act in the real world." Id. at 806. In Fred
14 Martin, the Court held that placing an ad in a journal was an
15 intentional act. Id. Here, the parties to not dispute that Premium
16 intentionally created and maintains a website with the intent of
17 selling Vydox. Accordingly, Premium has committed an intentional
18 act.

19 **ii. Expressly aimed at forum**

20 As the Ninth Circuit has recognized, courts "have struggled
21 with the question whether tortious conduct on a nationally
22 accessible website is expressly aimed at any, or all, of the forums
23 in which the website can be viewed." Mavrix Photo, Inc. v. Brand
24 Technologies, Inc., 647 F.3d 1218, 1229 (9th Cir. 2011). One case
25 from the earlier days of internet commerce drew a distinction
26 between "passive" websites and "interactive" sites, on which "users
27 can exchange information with the host computer," and looked to the
28 "level of interactivity and commercial nature of the exchange of

1 information" in determining whether to exercise personal
2 jurisdiction. Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414,
3 418 (9th Cir. 1997). In more recent years, cases have focused on
4 whether a defendant did "something more" than maintain a passive
5 website. See Mavrix, 647 F.3d at 1229. That "something more"
6 might take into account the interactivity of a website, but may
7 also look to "the geographic scope of the defendant's commercial
8 ambitions" or "whether the defendant 'individually targeted' a
9 plaintiff known to be a forum resident." Id. (citations omitted).

10 Here, the First Amended Complaint includes no specific
11 allegations about the operation of Premium's website. Although the
12 parties appear to agree that the website is interactive, as
13 consumers can make purchases from the website, "that a website is
14 commercial in nature and interactive does not necessarily mean
15 there is personal jurisdiction." DFSB Kollective Co. Ltd. v.
16 Bourne, 897 F.Supp.2d 871, 881 (N.D. Cal. 2012) (citing be2 LLC v.
17 Ivanov, 642 F.3d 555, 559 (7th Cir. 2011) ("If the defendant merely
18 operates a website, even a highly interactive website, that is
19 accessible from, but does not target, the forum state, then the
20 defendant may not be haled into court in that state without
21 offending the Constitution.")). Nor can this court discern from
22 either the FAC or Plaintiff's opposition any indication that
23 Premium took other efforts to target California consumers.
24 See DFSB Kollective, 897 F.Supp.2d at 881-882 (distinguishing cases
25 where defendants tailored website policies to comply with
26 California law, targeted customers based on consumer-provided zip
27 code information, hosted advertisements directed at California
28 residents, or focused on California-based industries). Absent

1 "something more" than the maintenance of a minimally interactive
2 website, Plaintiff has not met its burden to satisfy even the
3 purposeful availment prong of the specific jurisdiction test.

4 2. Defendant's forum-related activities

5 Even if Plaintiff had satisfied the purposeful availment
6 prong, he would still carry the burden of showing that his claim
7 arises out of or relates to the defendant's forum-related
8 activities. Schwarzenegger v. Fred Martin Motor Co., 374 F.3d at
9 802. Courts utilize a 'but for' test to determine whether a
10 particular claim arises out of forum-related activities and thereby
11 satisfies the second requirement for specific jurisdiction.³
12 Ballard v. Savage, 65 F.3d 1495, 1500 (9th Cir. 1995). Plaintiff
13 must demonstrate that 'but for' Defendant's contacts with
14 California, his claim would not have arisen. Saavedra v. Albin Mfg.
15 Corp., No. 10CV2312 L POR, 2011 WL 3664402, at *4 (S.D. Cal. Aug.
16 19, 2011).

17 Premium argues that Plaintiff cannot establish that his claims
18 arise out of Premium's forum-related activities. Premium did not
19 directly sell any product to Plaintiff. (Testino Decl. ¶ 29.)
20 Plaintiff purchased Vydox through an unnamed reseller. (FAC ¶5.)
21 Although Premium appears to concede that some of its resellers sell
22 to California residents, Plaintiff has not made any showing of the
23 extent of such sales, nor identified the reseller from who he

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³ The California Supreme Court rejected the "but for" in
26 Snowney v. Harrah's Entm't, Inc., 35 Cal. 4th 1054, 1068 (2005).
27 However, "[i]n determining the limits of federal due process, the
28 Court analyzes federal case law, and most importantly, the law of
the United States Supreme Court and the Ninth Circuit Court of
Appeals." Langlois v. Deja Vu, Inc., 984 F. Supp. 1327, 1336 (W.D.
Wash. 1997).

1 obtained Defendant's product.⁴ Plaintiff has not, therefore, met
2 his burden to satisfy the "arises out of" prong of the specific
3 jurisdiction test.

4 **IV. Conclusion**

5 For the reasons stated above, Defendant's Motion to Dismiss is
6 GRANTED.

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8 IT IS SO ORDERED.

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10 Dated: May 31, 2016



11 DEAN D. PREGERSON
United States District Judge

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27 ⁴ Indeed, Plaintiff devotes but a single sentence of his
opposition to this prong, conclusorily stating, "Similar to
Snowney, the instant case arises out of Defendant's contacts with
28 California. This assertion is insufficient to carry Plaintiff's
burden. See also note 3, supra.